No. 82-960

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

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1. Respondent erroneously contends (Br. 13-14) that the deference normally accorded the Board's construction of terms in the statute it administers is inapplicable to any construction that involves an essentially "jurisdictional" question or that concerns the "coverage of the Act." This Court has never suggested any such exception to the ordinary standard of review; instead, it has consistently upheld the Board's construction of any statutory term whenever the Board's reading of the statute is reasonable. For example, in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975), this Court, noting that the Board's holding respecting an employee's request for the assistance of a union representative at certain types of investigatory interviews represented "a permissible construction" of the phrase "'concerted activities' for * * * mutual aid or protection," held that that construction "by the agency charged by Congress with enforcement of the Act * * * should have been sustained." The Board's construction in that case extended the protection of the statute to circumstances that had, in

earlier years, been regarded as outside the coverage of the National Labor Relations Act. Nevertheless, this Court observed (420 U.S. at 266-267) that it was the special province of the Board to construe the statute in light of "changing patterns of industrial life," and it made clear that the Board's construction was subject only to "'limited judicial review'" (*id.* at 267, quoting *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)). See also *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303 (1977) (upholding Board's construction and application of the statutory term "agricultural laborers," where it represented "a reasonable interpretation of the statute," even though the issue was "jurisdictional").

In the present case, the Board—for more than 20 years— has consistently construed the term "concerted activities" as encompassing an employee's reasonable and honest attempt to claim a right secured in a collective bargaining agreement. For the reasons set forth in our opening brief, the Board's construction is a reasonable one, and is therefore entitled to acceptance by this Court.

2. Contrary to respondent's contention (Resp. Br. 14-15), the Board has not conceded that its construction of the term "concerted activities" is in any way contrary to the plain meaning of the statute. To the contrary, we expressly stated in our opening brief (NLRB Br. 17) that there is "no proper basis for rejecting the Board's *Interboro* doctrine on any plain meaning theory."

We did acknowledge that the *Interboro* doctrine concerns action taken by an individual employee, but, as respondent and the Chamber of Commerce as amicus curiae both concede (Resp. Br. 16-17; Chamber Br. 27), no court of appeals, not even those that have rejected the *Interboro* doctrine, has accepted the notion that action taken by an individual employee cannot ever constitute "concerted" activity within the meaning of Section 7 (29 U.S.C. 157).[1] The issue is simply where to draw the line with regard to what

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[1] Indeed, respondent's concession that an individual employee's conduct can properly be concerted activity within the meaning of Section 7 undermines completely its later contention (Br. 31-34) that Congress's stylistic choice of the plural "employees" in Section 7 was somehow intended as a significant limitation on the statute's coverage.

individual employee conduct is "concerted"—a problem the Board is particularly well suited to solve. The Board has reasonably concluded that "concerted" activity may embrace an individual's effort to claim a right secured from the employer by employees acting for common purposes through collective bargaining.

Respondent argues (Br. 19-20) that the Board's interpretation is unreasonable because it "creates an obvious redundancy in the statute by treating as 'concerted' any individual activity which meets the requirements of the 'purpose' clauses" of Section 7. But the *Interboro* doctrine involves both means and ends—the employee involved acts *for* the group in attempting to induce the employer to adhere to the collective agreement and also *uses* the strength of the group in seeking to take advantage of a right won through collective bargaining. Indeed, the means and ends in this case are the same as in those cases where a grievance procedure is initiated by a single employee, and respondent concedes (Resp. Br. 23) that filing a grievance with an employer is covered by Section 7.

Finally, respondent begs the question when it asserts (Resp. Br. 15) that "in a comparable context" this Court construed the term "concerted" in a prior version of Section 8(b) in a manner inconsistent with the Board's construction of "concerted" in Section 7 under the *Interboro* doctrine. See *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, 671 (1951). In *Rice Milling* the question was whether a labor union's appeals to the individual employees of a neutral employer not to cross the union's recognitional picket line and pick up commodities produced by the primary employer violated Section 8(b)(4) of the Act, 29 U.S.C. (Supp. I 1946 ed.) 158(b)(4).[2] The Court concluded that the union's

[2] Section 8(b)(4) as it then existed provided in pertinent part that it would be an unfair labor practice for a labor organization or its agents "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to * * * perform any services," where the labor organization or agent acted to accomplish any one of four prohibited objects. The term "concerted" was eliminated from Section 8(b)(4) by the 1959

separate appeals to individual employees were not aimed at eliciting "concerted" conduct, within the meaning of that provision of the Act. No collective bargaining agreement was involved in that case. Thus, respondent's assertion that the case is "comparable" to this one merely reflects respondent's disagreement with the Board's view that an employee's effort to claim rights secured in a collective agreement constitutes "concerted" conduct, as opposed to mere individual complaining.[3]

3. Respondent and amici contend (Resp. Br. 2-3, 23-25; Chamber Br. 4, 7-11; Roadway Express Br. 8-9) that, conceding that the actual filing of a contract grievance by an individual employee is "concerted" activity within the meaning of Section 7, the Board's application of the *Interboro* doctrine in this case is unreasonable because the employee did not file a grievance; he merely committed an act of "insubordination" by refusing to work. To answer this contention, we must disentangle two separate issues that are interwoven into the argument.

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amendments to the Act. See *NLRB* v. *Servette, Inc.*, 377 U.S. 46, 51-52 (1964).

[3] As we explained in our opening brief (NLRB Br. 24 n.13), the question in this case concerns only employee claims rooted in a collective bargaining agreement; the case does not raise the broader question whether, even absent a collective bargaining agreement, an employee complaint raising a matter of common concern may be regarded as "concerted" activity. Thus, the efforts of respondent and the Chamber of Commerce (Resp. Br. 20; Chamber Br. 18-19) to draw that broader question into issue and their citation of cases involving that question (*e.g.*, *Air Surrey Corp.*, 229 N.L.R.B. 1064 (1977), enforcement denied, 601 F.2d 256 (6th Cir. 1979); *Alleluia Cushion Co.*, 221 N.L.R.B. 99 (1975); *Indiana Gear Works*, 156 N.L.R.B. 397 (1965), enforcement denied, 371 F.2d 273 (7th Cir. 1967)) are misplaced.

In addition, in contending (Resp. Br. 21 & n.15) that the Second, Seventh, and Eighth Circuits are among the circuits that have rejected the Board's definition of "concerted activities," respondent relies on three cases that not only do *not* involve circumstances implicating the *Interboro* doctrine, but also expressly state that they were in no way rejecting the validity of the basic doctrine. See *Ontario Knife Co.* v. *NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *NLRB* v. *Dawson Cabinet Co.*, 566 F.2d 1079, 1084 (8th Cir. 1977) (Lay, J., concurring); *Pelton Casteel, Inc.* v. *NLRB*, 627 F.2d 23, 28 & n.10 (7th Cir. 1980).

First, there is the question whether the filing of a formal contract grievance is a prerequisite to finding "concerted" activity on the part of an employee seeking to claim a contract right. Second, there is the question whether a refusal to work may properly be characterized as mere insubordination when the contract right that the employee is attempting to assert *is* a right under the contract to refuse to do certain work. The answer to these questions is "no."

a. Several courts of appeals have implicitly held that an employee may claim a contract right without actually filing a formal grievance under the contract. Thus, in the original *Interboro* case, the employees concerned—and in particular, John Collins, the most persistent complainant—registered complaints about working conditions in a number of different ways. Collins made some complaints to the Union's business agent; others he made directly to the Company's supervisors or to the Company president himself. *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1296-1298 (1966), enforcement granted, 388 F.2d 495 (2d Cir. 1967). In making one of the complaints—a claim that he should not have to work separately from his brother—Collins contended that under the contract the welding assignment he had been given was a two-man job, and he refused to do it unless his brother was assigned with him. 157 N.L.R.B. at 1296. In concluding that Collins was engaged in "concerted" activity, the Board (*id.* at 1298) did not differentiate complaints made through the union's business agent from complaints made directly to company officials. Rather, it simply observed (*ibid.*; emphasis added) that "complaints made for [the purpose of enforcing the collective bargaining agreement] *are* grievances within the framework of the contract that affect the rights of all employees in the unit and thus constitute concerted activity which is protected by Section 7 of the Act." In enforcing the Board's order, the Second Circuit similarly did not differentiate among Collins' various complaints and it approved the view that "activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees." 388 F.2d at 500. There is no suggestion that only

the formal filing of a written grievance can be regarded as concerted activity.

Similarly, in *NLRB* v. *Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971), the employee in question had complained both to the employer directly and to a union agent about alleged violations of contractual wage provisions, and he was discharged by the employer for "'words and actions' demonstrating that 'you were not entirely satisfied with your new pay scale'" (*id.* at 206). In finding that the employee had been discharged for engaging in concerted activity within the meaning of Section 7, the court of appeals did not refer to the filing of formal grievances; it referred to "activities involving attempts to enforce the provisions of a collective bargaining agreement" (452 F.2d at 206, quoting *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967)).[4]

Moreover, precedent aside, there is no logical reason to require a formal grievance before an employee's attempt to enforce his collective rights can be protected under Section 7. The filing of a grievance—at least in the first steps of a grievance procedure—may differ very little from a simple complaint to an employer. In the present case, for example, the first step of the grievance procedure involved a conference between "the aggrieved employee, the shop steward, *or* both, and the foreman of [the employee's] department" (J.A. 62; emphasis added). Employee Brown, in essence, presented his complaint to the two supervisors with authority over the drivers; he told both Supervisor Jasmund and Supervisor Madary that the truck he was assigned to drive was unsafe and that he would refuse to drive it for that reason.

In addition, in this case Brown had no reason to file a formal grievance at the time he first asserted his contractual right. After he complained to the supervisors, neither of them contradicted his assertion about the truck or told him

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[4] While, as respondent notes (Resp. Br. 21), the Eighth Circuit, in *NLRB* v. *Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217 (1970), did advert to the submission of a grievance, the court nowhere indicated that its finding of concerted activity was dependent on that fact. See *NLRB* v. *Dawson Cabinet Co.*, 566 F.2d at 1084 (Lay, J., concurring).

that he would be disciplined for refusing to drive.[5] The occasion for taking further action through the grievance procedure did not arise until Brown was informed, later that day, that respondent was discharging him for asserting his right to refuse to drive the truck. Brown then filed a formal grievance under the contract (Pet. App. 14a-15a). In these circumstances, the Board was reasonable in concluding that Brown, in refusing to drive the truck to which he was assigned, was asserting a contract right.[6]

b. Respondent and amici repeatedly (Resp. Br. 23-27, 40; Chamber Br. 4-15; Roadway Br. 8-10) characterize Brown's action as mere "insubordination" that violated the established principle of obey-and-grieve, and assert that Brown was thus properly subject to swift disciplinary action by respondent. Although, in some circumstances, a work refusal may constitute an unprotected repudiation of a contractual agreement to grieve rather than strike, the "insubordination" contention raises an issue that is not properly presented in this case and that is, in any event, without merit on the record here.

As we noted in our opening brief (NLRB Br. 7 n.4, 29 n.16) and as respondent concedes (Resp. Br. 6-7), respondent's exceptions to the Board challenged only (1) the validity of the *Interboro* doctrine as a matter of law and (2) the

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[5] The administrative law judge credited Brown's version of his conversation with Supervisor Madary, the last supervisor to whom Brown spoke before leaving (Pet. App. 14a & n.7; J.A. 12, 17). Brown testified (J.A. 12) that Madary responded to his refusal for safety reasons to drive Truck No. 244 by stating that respondent would not be able to get all the garbage hauled "[i]f we go around trying to solve all the problems with the trucks we have," and finally by protesting to Brown that he didn't "want to hear [about safety considerations]."

[6] The court of appeals did not rest its decision on any rejection of the Board's factual findings; it simply rejected the Board's legal conclusion, which rested on the *Interboro* doctrine. Therefore respondent's attempt to suggest, by recounting evidence either discredited or otherwise not relied on by the Board (Resp. Br. 3-5), that Brown refused to drive the truck for reasons other than a reasonable, good faith belief that it was unsafe raises a factual issue that respondent concedes (Resp. Br. 8-9) was not considered or decided by the court of appeals and that would remain for decision by that court upon remand.

administrative law judge's factual finding that Brown's work refusal was not predicated on some other complaint having no basis in the collective bargaining agreement.[7] Thus, the question whether Brown forfeited the protection of Section 7 by the manner in which he made his claim, was not before the court below and is not properly presented in this Court. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). To put the issue into perspective, it bears repeating that the theory on which respondent prevailed in the court below does not turn on whether an employee asserts his claim by complaining orally to the employer and is discharged for making the complaint, or whether he asserts his claim by refusing to do the work in dispute and is discharged for that refusal (see NLRB Br. 27-28). The only issue in this case is whether an individual employee's reasonable, good faith assertion of a contract right is "concerted" activity within the meaning of Section 7 of the Act.[8]

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[7] Although respondent's brief in support of its exceptions adverted to the fact that "Brown simply walked off the job" (Brief to Board at 12), respondent made no effort to distinguish any issue separate from the question whether the action was "concerted."

[8] *Yellow Freight System, Inc.*, 247 N.L.R.B. 177 (1980), cited by amicus Chamber of Commerce (Chamber Br. 9-10), indicates the distinction between "concerted" and "protected" and makes clear that nothing in the *Interboro* doctrine precludes a finding that an employee, although engaging in concerted activity by making a reasonable, good faith contract-based claim, has forfeited the protection of the Act because of the manner in which he has made his claim. In *Yellow Freight*, the Board first held (247 N.L.R.B. at 180-181) that the employee's action did not come within the *Interboro* doctrine because his protest "was not a reasonably based contract claim." Second, as an additional ground the Board held (*id.* at 181) that, even if the first point were resolved in the General Counsel's favor, the complaint must be dismissed because "the manner in which [the employee] made such an assertion rendered his conduct unprotected."

Amicus Roadway Express also indicates the distinctness of the two issues when it asserts (Roadway Br. 20-21) that, "[i]n refusal to work situations, it is irrelevant that a driver may be accompanied by a helper on the truck he refuses to drive, or that he files a grievance with his union, or even that he refuses to work on instructions from his union." However, these considerations, although irrelevant to the question whether the protection of the Act has been forfeited because the pro-

In any event, given the nature of the contract right Brown was claiming, the Board was not required to find that his refusal to drive the truck was unprotected. Brown's claim was not merely that he had a right to be assigned only to trucks that are in safe operating condition—his contract granted him a right, when justified by safety considerations, to refuse to drive a truck without being found in "violation of this Agreement" (J.A. 64, Article XXI, Section 1). As amicus Roadway Express implicitly concedes (Roadway Br. 25-26), such a provision is a contractual counterpart to federal laws removing the effect of no-strike clause sanctions under certain circumstances. It is, in short, an exception to the obey-and-grieve principle, negotiated, no doubt, because the interest in not being forced to risk one's life and health with unsafe equipment cannot easily be vindicated by after-the-fact grievance resolutions upholding the right to refuse to take that risk.[9]

4. Finally, there is no merit to the contentions of respondent and amici (Resp. Br. 34-39; Chamber Br. 14-15, 21-22; Roadway Br. 10-16, 25-26) that the Board's decision in this case improperly substitutes the standards of the Board for the contractual standard that would be applied by an arbitrator and thereby contravenes the statutory policy favoring arbitration of disputes.

It is at least arguable that the "justified refusal" standard in the contract is, as a practical matter, equivalent to the Board's requirement under *Interboro* that the claim constitute a reasonable, good faith assertion of a contract right. Compare *Chemical Leaman Tank Lines, Inc.*, 251

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test violated the no-strike clause, were considered relevant by the court below in its holding that Brown's action was not "concerted" (Pet. App. 3a-5a). For the reasons set forth above, that holding was error.

[9] Contrary to respondent's contention (Resp. Br. 40-41), the observation in our opening brief (NLRB Br. 30) that refusals to perform work on safety grounds represent a "special case" did not refer to any Board rule that a contract-based *safety* protest should be treated differently from other types of contract-based employee protests for purposes of determining whether the protest is concerted activity under the *Interboro* doctrine. Rather, we simply observed that the nature of the safety interest often may lead unions to negotiate exceptions to the no-strike clause like the contractual provision involved here.

N.L.R.B. 1058, 1058 (1980) (Member Truesdale, noting similarity of statutory and contractual issues) with *American Freight System, Inc.*, 264 N.L.R.B. No. 18, 111 L.R.R.M. 1385, 1386 (1982), petition for review pending, No. 82-2243 (D.C. Cir. argued Sept. 30, 1983) (Board declined to defer to grievance committee decision because it appeared that grievance concerning discharge might have been denied on grounds that equipment was subsequently shown to be safe in fact rather than on grounds that employee was acting unreasonably on basis of what was known at the time of his work refusal.) But even if the Board's good faith standard gives the employee a slight extra margin for error, it is not inconsistent with the purposes of Section 7 to do so, at least where, as here, the "justified" work refusal clause (J.A. 64), read together with the no-strike clause (J.A. 63-64), does not clearly and unmistakably restrict the right to quit work in protest over unsafe conditions to situations in which the conditions are shown to be unsafe in fact. See *Metropolitan Edison Co.* v. *NLRB*, No. 81-1664 (Apr. 4, 1983), slip op. 14 (waiver of statutory right "must be clear and unmistakable").[10]

If employees must fear discharge for the assertion of even good faith claims to contract rights, then they may well be reluctant to try to claim these rights in circumstances in which they are undeniably entitled to assert the claim. Rights won through the employees' collective strength in bargaining with the employer are of little use if employees are fearful ever to assert them. *Banyard* v. *NLRB*, 505 F.2d 342, 350 (D.C. Cir. 1974) (MacKinnon, J., concurring). And, as we have noted (p. 9, *supra*), contract rights such as the one involved here have little practical significance unless they can be asserted at the only time that counts—the point at which the employee is ordered to

[10] As amicus Roadway Express points out (Roadway Br. 25-26), the contractual standard is a "much more flexible standard" than the one applicable in cases involving the protection of federal statutes specifically relating to safety, such as Section 502 of the Labor Management Relations Act, 29 U.S.C. 143, or Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c).

take the action that he asserts, reasonably and in good faith, he is entitled to refuse to take.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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